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IN THE

Supreme Court of the United States

CHEVRON U.S.A. INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL COUNCIL ON DISABILITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

PETER BLANCK*
Professor and Director
LEONARD A. SANDLER
Clinical Professor
and Co-Director
UNIVERSITY OF IOWA COLLEGE
OF LAW, AND LAW, HEALTH POLICY
AND DISABILITY CENTER
431 Boyd Law Bldg.
University of Iowa
Iowa City, IA 52242-1113
(319) 335-9043

* *Counsel of Record*

DIANE KUTZKO
MARK L. ZAIGER
DOUGLAS R. OELSCHLAEGER
SARAH J. GAYER
SHUTTLEWORTH & INGERSOLL, P.L.C.
500 Firstar Bank Bldg.
P.O. Box 2107
Cedar Rapids, IA 52406
(319) 365-9461

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Counsel for Amicus Curiae

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Interest of *Amicus Curiae*	1
Statement of the Case	3
Summary of the Argument	4
Argument	8
I. Title I Of The ADA Is Designed To Secure Civil Rights For Persons With Disabilities Based On Their Abilities And Without Regard To Myths And Misconceptions About Their Employment Capabilities	8
A. The ADA Marked A Watershed In Civil Rights For Persons With Disabilities And The Abandonment Of The Medical Model Of Disability	8
B. The Text And Legislative History Of The ADA Demonstrate That Eliminating Paternalism Was An Overriding Purpose Of Congress	11
C. Congress Viewed The Exclusion Of Individuals With Disabilities Who Pose Only A Direct Threat To Themselves As An Impermissible Act Of Paternalism	14

Contents

	Page
II. Incorporating "Direct Threat" Into The Definition Of "Qualified Individual" Would Undercut The Structural Integrity And Purposes Of The Act	17
III. The EEOC's Regulations Concerning Direct Threat To Self Are Not Entitled To *Chevron* Deference	23
Conclusion	25

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	11
Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999)	7
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	23, 24
Dothard v. Rawlinson, 433 U.S. 321 (1977)	16
Duncan v. Walker, 121 S. Ct. 2120 (2001)	22
E.E.O.C. v. United Parcel Services, Inc., 149 F. Supp. 2d 1115 (N.D. Cal. 2000)	21
EEOC v. Wafflehouse, Inc., No. 99-1823 (S. Ct. Jan. 15, 2002)	20, 23
Fox v. Standard Oil Co., 294 U.S. 87 (1935)	19
Frontiero v. Richardson, 411 U.S. 677 (1973)	11
International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991)	16
LaChance v. Duffy's Draft House, Inc., 146 F.3d 832 (11th Cir. 1998)	22
Montclair v. Ramsdell, 107 U.S. 147 (1883)	23

Page

Olmstead v. L.C., 527 U.S. 581 (1999) 14

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 23

Sutton v. United Airlines, 527 U.S. 471 (1999) 1

TRW Inc. v. Andrews, 122 S. Ct. 441 (2001) 22

Turco v. Hoechst Celanese Corp., 101 F.3d 1090 (5th Cir. 1996) 22

United States v. Mead Corp., 121 S. Ct. 2164 (2001) 24

United States v. Menasche, 348 U.S. 528 (1955) .. 22, 23

United States v. Shimer, 367 U.S. 374 (1961) 24

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 21

Statutes:

29 U.S.C. § 781 1

42 U.S.C. § 2000e-2(k)(1)(A)(i) 21

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42 U.S.C. § 12101(a)(2) 10

42 U.S.C. § 12101(a)(3) 10

Page

42 U.S.C. § 12101(a)(5) 10, 16, 24

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42 U.S.C. § 12112(a) 5, 17

42 U.S.C. § 12112(b)(5)(A) 19

42 U.S.C. § 12112(b)(6) 19, 21

42 U.S.C. § 12113(a) 5, 19, 20, 21

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29 C.F.R. § 1630.2(n)(1) (2001) 18

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Page

134 Cong. Rec. S5090-02 (daily ed. April 28, 1988) 15

135 Cong. Rec. S4979-02 (daily ed. May 9, 1989) .. 12

135 Cong. Rec. S10701-04 (daily ed. Sept. 7, 1989) 15

136 Cong. Rec. E1656-02 (daily ed. May 22, 1990) 8

136 Cong. Rec. E1913-01 (daily ed. June 13, 1990) 15

136 Cong. Rec. H1920-04 (daily ed. May 1, 1990) 16

136 Cong. Rec. H2421-02 (daily ed. May 17, 1990) 16

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Page

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H.R. Rep. No. 596 (1990) 16

S. Rep. No. 101-116 (1989) 21

S. Rep. No. 357 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3712 12

Nicholas A. Ashford *et al.*, *Monitoring the Worker for Exposure and Disease* 71 (1990) 13

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Cited Authorities

	Page
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INTEREST OF *AMICUS CURIAE*[1]

The National Council on Disability (NCD), as this Court has recognized, provided the founding vision and the initial framework for the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA" or "the Act").[2] For more than two decades, the NCD has monitored and evaluated the state of America's disability-related civil rights laws and policies through research, town meetings, and intergovernmental collaboration.

Formerly the National Council on the Handicapped, the NCD is an independent federal agency composed of 15 members appointed by the President and confirmed by the Senate. It is charged by statute with reviewing federal laws, regulations, programs, and policies affecting people with disabilities. It is also required by law to make recommendations to the President, the Congress, and other federal officials and entities regarding ways to promote equal opportunity, economic self-sufficiency, inclusion and integration into all aspects of society for Americans with disabilities. 29 U.S.C. § 781 (1994).

The NCD was instrumental in creating the legislative record that Congress considered when deliberating the ADA, and it played a pivotal role in the passage of that landmark civil rights law. *See* H.R. Rep. No. 485, pt. 2, at 30-31, 34, *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 316. Guided and informed by

1. The parties have consented to the filing of this brief. Letters of consent were lodged with the Clerk of Court on January 22, 2002. The following brief was not authored, in whole or in part, by counsel for either party. No person or entity, other than the *amicus curiae*, its members and counsel, contributed monetarily to the preparation or submission of the brief.

2. *See Sutton v. United Airlines*, 527 U.S. 471, 484-85 (1999); *see also* H.R. Rep. No. 485, pt. 2, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

this unique mandate and perspective, the NCD submits this brief *amicus curiae.*

The NCD is pledged to support the letter and the spirit of the ADA and to preserve the integrity and bedrock principles of the law.[3] Prominent among these are the equal opportunity and self-determination of persons with disabilities. Here, this Court is being asked to allow employers to shut the door on qualified individuals with disabilities who employers believe might be harmed by exposure to a workplace environment.

In this case, petitioner Chevron seeks to accomplish that goal by relying on a "direct threat to self" defense to discrimination charges created by the Equal Employment Opportunity Commission ("EEOC"). Such a defense is found nowhere in the language of the Act, is directly contrary to a plain and natural reading of the Act, and is inconsistent with the clearly expressed intent of Congress. The EEOC's position gives employers the right to decide the degree of risk an individual with a disability can and should accept in performing his or her job. The defense essentially would allow employers unilaterally to bar or dismiss from jobs qualified workers who do not pose a health or safety risk to others, but perhaps only to themselves. Moreover, as in Mr. Echazabal's case, this determination is based on speculative and, at best, probabilistic medical criteria. The result is to endorse the unjustified paternalism and stereotyping that Congress expressly sought to eliminate.

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3. Consistent with that role, NCD published its report to the President of the United States and Congress, *Toward Independence* (1986), *cited in* 135 Cong. Rec. S10765-01, S10790 (daily ed. Sept. 7, 1989) (The NCD report "concluded that the major obstacles facing people with disabilities are not their specific individual disabilities but rather the artificial barrier imposed by others.") (Statement of Sen. Dole).

STATEMENT OF THE CASE

Mario Echazabal worked at Chevron's El Segundo, California oil refinery for some 20 years. During this time, he worked as a laborer, helper, and pipefitter for various maintenance contractors, primarily in the coker unit. Joint Appendix 10 (hereinafter "J.A."). In 1992 Echazabal applied to work directly for Chevron at the refinery's coker unit as a pipefitter/mechanic. He again applied in 1995 for the position of plant helper. J.A. 172-73. On both occasions, Chevron determined that he was qualified for the job and could perform its essential functions. Chevron extended Echazabal a job offer contingent on his passing a physical examination. J.A. 55, 172-73.

After examination and review, Chevron's physician concluded that Echazabal should not be exposed to the solvents and chemicals in the refinery, even though Echazabal's own physician stated he had "no limitations." J.A. 95. Chevron's decision was based on a medical assessment of Echazabal's chronic liver condition, diagnosed as Hepatitis C. J.A. 96-97. In 1996, prior to the phone conversation that took place between Echazabal's physician, Dr. Weingarten, and Chevron's Dr. McGill, and after turning him down for the second time, Chevron wrote to Irwin Industries, Echazabal's employer at the refinery. Chevron demanded that Irwin immediately remove Echazabal from the refinery or place him in a position that eliminated his exposure to solvents/chemicals. J.A. 57-58. This action was taken even though Echazabal's hepatitis never caused injury or accident to himself or anyone else at the refinery.

Chevron refused to hire Echazabal and barred him from working as a plant helper at the refinery. After losing his position at the refinery, Echazabal filed a complaint with the Equal Employment Opportunity Commission. He subsequently filed a complaint in state court (which was removed to federal court)

alleging, among other claims, discrimination on the basis of a disability in violation of the ADA.

The district court granted summary judgment in favor of Chevron. The Ninth Circuit reversed, holding that the direct threat defense contained in the ADA does not permit employers to exclude from employment qualified individuals with disabilities who pose a risk only to themselves and not others; and that the risk that Echazabal poses to his own health does not affect whether he is a qualified individual for purposes of the Act. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1072 (9th Cir. 2000). This Court granted Chevron's petition for certiorari.

SUMMARY OF THE ARGUMENT

Encountering risk is an element of everyday life experience. Assessing and accepting risk are basic elements of personal independence and the exercise of adult responsibility. Congress understood that and acknowledged in the ADA that discrimination takes many forms, including paternalism and stereotyping. *See* H.R. Rep. 485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356. Perhaps the most long-standing and insidious aspect of this type of discrimination is the assumption that people with disabilities are not competent to make informed, wise, or safe life choices. This myth is most apparent and damaging in the employment context.

In its 1986 report to the President and the Congress, upon which Congress relied in its consideration and passage of the ADA, NCD recognized the importance of access to employment as key to the independence of individuals with disabilities:

> As for most other Americans, a major prerequisite to economic self-sufficiency for individuals with disabilities is a job. Employment is an essential

> key to successful adult integration into community life. Various forms of work are associated with greater independence, productivity, social status, and financial security. Success and quality of life are often measured in terms of paid employment.

See National Council on the Handicapped, *Toward Independence* 18-21 (1986).

In part in response to these concerns, Congress passed the ADA and set forth findings about the pervasive nature of discrimination against persons with disabilities. These findings included discrimination resulting from over-protective rules and policies, as well as intentional discrimination that relegated individuals with disabilities to lesser and inferior jobs and foreclosed their employment opportunities. H.R. Rep. No. 485, pt. 2, at 28-29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310-11. The resultant loss to this nation in economic productivity was estimated to be in the billions of dollars. 42 U.S.C. § 12101(a)(9).

Consistent with Congress's findings, Title I of the ADA prohibits discrimination against a "qualified individual with a disability" on the basis of myths, stereotypes, and misperceptions about job capabilities. 42 U.S.C. § 12112(a). The ADA defines a "qualified individual with a disability" as a person with a disability "who, with or without reasonable accommodation, can perform the essential functions" of the job. 42 U.S.C. § 12111(8).

Title I permits certain employer defenses based on qualification standards that are "job-related" and "consistent with business necessity." 42 U.S.C. § 12113(a). Those defenses include the requirement that an employee not pose a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). "Direct threat" is defined as

"a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). Nowhere in the Act is "direct threat" defined or referred to as a risk to self. In fact, there is not a single reference in the Act or the legislative history denoting that a threat to the disabled employee himself is a defense for the employer to refuse to hire the employee.

Nevertheless, the EEOC issued regulations that expanded the definition and defense of "direct threat" beyond the explicit language of the ADA. The EEOC regulations define direct threat to mean "a significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (2001) (emphasis added). Moreover, the regulations provide that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (2001).

The EEOC's interpretation is fundamentally inconsistent with the text and purpose of the statute. Congress could easily have used the phrase "direct threat to the health or safety *of the individual* or other individuals in the workplace," but it did not. That omission cannot be viewed as an oversight, given the fundamental importance of this phrasing in accomplishing the goals of the statute.

The EEOC's strained interpretation of the direct threat defense to include risk to self undermines the ADA's primary principle. Congress recognized that employer assessment of the risk to the employee historically served as a reason for the unwarranted exclusion — well meaning or otherwise — of qualified individuals from work. The Act was drafted to leave the assessment of personal risk to the employee in consultation with his or her treating physician. The employer was prohibited

from considering the effect on health or safety, unless and until the individual's condition or behavior imperils the health or safety of others in the workplace, or the individual fails to meet specific health or safety standards imposed by federal authorities. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Congress treated the effect of federal standards differently because they were more likely to be general standards applicable to all individuals and, therefore, not based on a paternalistic protection of disabled persons. On the other hand, in the context of private employers' evaluations, Congress recognized that such considerations are a form of paternalism that can pose insurmountable barriers to employment. *See* H.R. Rep. No. 485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

Mario Echazabal dramatically exemplifies the situation the ADA was intended to prevent and the harm that results from the application of the EEOC's expanded notion of direct threat. Echazabal successfully performed the essential functions of various jobs in Chevron's refinery coker unit for some twenty years without accident or injury to himself or anybody else. Echazabal was capable of making independent and informed decisions about his employment and medical treatment. Record evidence establishes that Echazabal continued to work in the coker unit at the refinery with full knowledge of his medical condition and of the chemicals and solvents to which he was exposed, and he did so in consultation with his treating physicians. Chevron was fully apprised and aware of Echazabal's health status during these years, through the repeated appointments and evaluations conducted at the Chevron refinery clinic while Echazabal continued to work amidst the hepatoxins.

Chevron is attempting to use the EEOC's rule to override Echazabal's personal decision to continue his day-to-day job activities, because the company, rather than the employee, believes that any exposure to liver toxic chemicals is unacceptable to it. J.A. 32. This action is contrary to the language and intent of the Act.

The Act is carefully calibrated to balance the interests of employers and individuals with disabilities, and it requires that issues be addressed in an ordered and tiered sequence. The threshold determination is whether an individual is qualified to perform the job, with or without reasonable accommodations. Then and only then can the defense of direct threat to others be evaluated.

Congress chose to draft the definition of "direct threat" narrowly. Where Congress has spoken clearly, as here, the natural and direct meaning of the Act controls over any interpretation placed on it by an administrative agency. The EEOC regulations extending the direct threat defense to individuals who pose a substantial health or safety risk to themselves accordingly are not entitled to *Chevron* deference. For these reasons, the Ninth Circuit's decision should be affirmed.

ARGUMENT

I. TITLE I OF THE ADA IS DESIGNED TO SECURE CIVIL RIGHTS FOR PERSONS WITH DISABILITIES BASED ON THEIR ABILITIES AND WITHOUT REGARD TO MYTHS AND MISCONCEPTIONS ABOUT THEIR EMPLOYMENT CAPABILITIES

A. The ADA Marked A Watershed In Civil Rights For Persons With Disabilities And The Abandonment Of The Medical Model Of Disability

By enacting the ADA, Congress committed the federal government to the protection of the civil rights of individuals with disabilities, and abandoned a prior focus on social programs that tended to isolate those individuals. 136 Cong. Rec. E1656-02, E1656 (daily ed. May 22, 1990) ("I agree with the National Council on Disability in its belief that the provisions of this

legislation send persons with disabilities a clear message that their dream of equal civil rights protections will soon become a reality") (Statement of Rep. Gingrich).

The ADA's civil rights model was founded on the principle that individuals with disabilities are a minority group entitled to the same hard-won legal protections as African-Americans and women. It supplanted the "medical model" that focused on the individual, whose disability was conceived as an infirmity that precluded full participation in the economy and in society. The medical model posited that government should direct resources to rehabilitation programs that would assist "the handicapped" to overcome their impairments. *See* Peter Blanck & Michael Millender, *Before Disability Rights: Civil War Pensions and the Politics of Disability in America*, 52 Ala. L. Rev. 1, 2-3 (2000). The medical model also relegated people with disabilities to a subordinate role in their encounters with physicians, employers, and others who aimed to help the disabled adjust to a society structured around the convenience and outlook of the non-disabled. *Id.* at 2.

Because the medical model never questioned the physical and social environment in which disabled people were forced to function, it countenanced their segregation and marginalization. And, because it aimed to address the "needs" of the disabled rather than to recognize their civil rights, the medical model led to governmental policies that viewed assistance for the disabled as a species of welfare. *See generally* Joseph Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 41-64 (1993).

By contrast, the civil rights model that began to influence government policy in the 1970s proposes that disability is a social and cultural construct. The civil rights model focuses on the laws and practices that subordinate disabled persons and insists that government must secure the equality of disabled

persons by eliminating the legal, physical, economic, and paternalistic barriers that preclude their full involvement in society. *See* Peter Blanck & Michael Millender, *Before Disability Rights: Civil War Pensions and the Politics of Disability in America*, 52 Ala. L. Rev. 1, 3 (2000).

The paternalism that the ADA was designed to counteract was chronicled by Congress in the Act's findings and purposes:

- In the past, "society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2).

- Discrimination against individuals with disabilities "persists in such critical areas as employment . . ." 42 U.S.C. § 12101(a)(3).

- Individuals with disabilities "continually encounter various forms of discrimination," "overprotective rules and policies," as well as "outright intentional exclusion." 42 U.S.C. § 12101(a)(5).

- Individuals with disabilities are often relegated to "lesser . . . jobs." 42 U.S.C. § 12101(a)(5).

- Individuals with disabilities have been reduced to a "position of political powerlessness in our society . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). The "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and

costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity." 42 U.S.C. § 12101(a)(9).

The integrity of these findings and purposes is potentially compromised by the EEOC regulations at issue in this case.

B. The Text And Legislative History Of The ADA Demonstrate That Eliminating Paternalism Was An Overriding Purpose Of Congress

The legislative history identified "paternalism"[4] and targeted it for elimination as "perhaps the most pervasive form of discrimination for people with disabilities." H.R. Rep. No. 485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356; *see also* 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990); 136 Cong. Rec. S9680-01, S9680 (daily ed. July 13, 1990); H.R. Rep. No. 485, pt. 3, at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465. Eliminating paternalism goes hand in hand with ensuring equal opportunity and full participation for disabled individuals in the workplace.[5] The Senate Committee

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4. *See Webster's Encyclopedic Unabridged Dictionary of the English Language* 1056 (1994) (defining paternalism as "the system, principle, or practice of managing or governing individuals, businesses, nations, etc. in the manner of a father dealing with his children: *The employees objected to the paternalism of the old president*"); *Merriam-Webster's Collegiate Dictionary* 851 (10th ed. 1993) (defining paternalism as "a system under which an authority undertakes to supply needs or regulate conduct of those under its control in matters affecting them as individuals as well as in their relations to authority and to each other").

5. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) ("There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.") (Thomas, J., concurring); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (explaining that sex discrimination "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

on Labor and Human Resources acknowledged: "[T]he values and principles underpinning the ADA . . . include the right of persons with disabilities to independence, inclusion, choice and self-determination, and access . . . and respect for individual differences." S. Rep. No. 357, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3712, 3718.

A central tenet of the ADA is that people are to be "judged as individuals on the basis of their abilities and not on the basis of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." 135 Cong. Rec. S4979-02, S4984 (daily ed. May 9, 1989) (Statement of Sen. Harkin); *see also* H.R. Rep. No. 485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340; H.R. Rep. No. 485, pt. 3, at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 468. That core theme was reinforced in committee reports and proceedings. "[I]t would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual or based on a presumption about the ability of that individual to perform certain tasks." H.R. Rep. No. 485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340.

Mario Echazabal is a qualified worker within the meaning of the ADA who successfully performed the various jobs he held at the refinery. J.A. 10. For twenty years, he worked in close proximity to the very solvents and chemicals about which Chevron is now concerned. He was fully able to evaluate and appreciate the risks posed by the refinery jobs and made informed choices about whether or not to accept those risks. J.A. 10, 11, 32. Chevron, moreover, has not cited to any hepatitis-related workers' compensation or other workplace accident or injury claim filed by Echazabal during this time period.

None of Chevron's physicians was willing or able to calculate or quantify the risk of harm that might befall Echazabal at any time in the future. They were aware only that sooner or later his working at the refinery could possibly damage his liver. J.A. 56. Chevron defended its decision not to hire Echazabal based on the claim that any risk to Echazabal, no matter how far in the future and how speculative, would be unacceptable in light of the company's aversion to risk.[6]

Reliance on a medical opinion that is based on future possibilities, and that seeks to "protect" an individual such as Echazabal from himself, is precisely what Congress intended to prevent.[7] *See, e.g.*, 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990).

> Thus, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply protecting the individual from opportunistic diseases to which the individual might be exposed. That is a concern on which the individual should consult with his or her private physician and make decisions accordingly.

(Statement of Rep. Owens).[8]

6. In testimony concerning the risk that an individual in Echazabal's position and health would encounter, one of Chevron's evaluating physicians testified that "[a]ny level above one percent is high for me when it's a person's life." J.A. 88. That same physician testified, without regard to Echazabal's own decisionmaking capacities, "I just don't want this individual to be exposed to hepatoxins." J.A. 91.

7. Because there is no restriction on the scope of post-offer medical examinations or inquiries, these examinations may screen for conditions, susceptibilities, or sensitivities, that may predispose an applicant to an increased risk of harm in the future if exposed to a particular substance or work environment. *See* Nicholas A. Ashford *et al.*, *Monitoring the Worker for Exposure and Disease* 71 (1990).

8. With advances in medical technology, including genetic
(Cont'd)

A regulation or policy that denies disabled employees the right to decide whether or not to accept the risks posed by a job would embed into law the notion that all individuals with a disability are incapable of engaging in basic decisionmaking. *See generally Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (explaining that unjustified institutional placement of disabled individuals perpetuates stereotypes regarding individual choice).

C. Congress Viewed The Exclusion Of Individuals With Disabilities Who Pose Only A Direct Threat To Themselves As An Impermissible Act Of Paternalism

Both chambers of Congress recognized that extending the direct threat defense to employees who posed a direct threat only to themselves was an act of entrenched paternalism. Senator Kennedy stated:

> It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, *employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health.* For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a

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screening, there is the potential for excluding large numbers of pre-symptomatic individuals — "the healthy ill" — on the basis of potential health or safety risks to themselves in the future. As one commentator suggested, the problem with the use of genetic testing to exclude workers is that "an individual's risk of injury or illness from exposure can be elevated relative to the average because of genetic inheritance, because of acquired characteristics, or . . . because of a combination of genetic and environmental influences." Edward J. Calabrese, *Pollutants in High-Risk Groups: the Biological Basis of Increased Human Susceptibility to Environmental and Occupational Pollutants* 192 (1978).

> concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

136 Cong. Rec. S9684-03, S9697 (daily ed. July 13, 1990) (emphasis added); *see also* 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990) (expressing the same concern in almost identical language).

Congress vested individuals with disabilities with the power to decide whether or not to apply for or keep working at jobs that pose risks only to themselves, so long as they meet externally imposed governmental qualifications and health and safety standards. Employers were granted the authority to reject applicants and employees who pose a substantial risk of harm to *others* in the workplace.[9]

9. When first introduced, the ADA did not contain a direct threat defense. 134 Cong. Rec. S5090-02 (daily ed. April 28, 1988). When the Act was reintroduced in 1989, Congress added a direct threat defense to "allay any concerns" that the Act would require employers to "hire or retain employees who posed a significant risk to others." 136 Cong. Rec. E1913-01, E1915 (daily ed. June 13, 1990); *see also* 136 Cong. Rec. H2599-01, H2623-24 (daily ed. May 22, 1990); 136 Cong. Rec. S9684-03, S9686 (daily ed. July 13, 1990).

In its initial form, the direct threat defense applied only to individuals who had a "currently contagious disease or infection." 135 Cong. Rec. S10701-04, S10703 (daily ed. Sept. 7, 1989). During consideration by the Committee on the Judiciary, although the defense was extended to all individuals with disabilities (H.R. Rep. No. 485, pt. 3, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446), the Committee made the defense more difficult to establish by adding a definitional section imposing both a significant risk requirement and a reasonable accommodation requirement: "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." H.R. Rep. 485, pt. 3, at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457. According to the

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Chevron's conduct may appear on the surface to be less egregious than overt acts of intentional exclusion based on disability. But Chevron and its doctors did not engage in the interactive process contemplated by the ADA or assist Echazabal in weighing the pros and cons of his continuing to work around solvents in the refinery. Most important, they took it upon themselves to dictate what was best for him, excluding him from the dialogue and decision. Chevron's professed motivation was to avoid liability and to mitigate any costs associated with the risk of injury. *See* Brief of Petitioner at 23-28. In the end, Chevron's actions threatened Echazabal's livelihood. This approach is emblematic of the negative attitudes and discriminatory employer conduct that the ADA proscribes. 42 U.S.C. § 12101(a)(5).[10]

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Committee's Report, this definition was intended to "codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline*." *Id.*

Consistent with the purpose of the "direct threat" defense, the legislative history is replete with descriptions of the defense as applying only to employees that pose a risk to other individuals. *See* 136 Cong. Rec. H1920-04, H1921 (daily ed. May 1, 1990); 136 Cong. Rec. H2421-02, H2449 (daily ed. May 17, 1990); 136 Cong. Rec. H4614-02, H4617 (daily ed. July 12, 1990); H.R. Rep. No. 485, pt. 3, at 34, 45-46 (1990), *reprinted in* 1990 U.S.C.C.A.N 445, 457, 468-69; H.R. Rep. No. 596, at 57 (1990). *Cf.* H.R. Rep. No. 485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338 ("It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property.").

10. *See International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

II. INCORPORATING "DIRECT THREAT" INTO THE DEFINITION OF "QUALIFIED INDIVIDUAL" WOULD UNDERCUT THE STRUCTURAL INTEGRITY AND PURPOSES OF THE ACT

Congress crafted the Act to calibrate and balance the interests of employers and individuals with disabilities. It did so by creating a structured and tiered analysis that must proceed in an ordered sequence. Once a determination is made that an individual has a disability, a determination must be made as to whether or not the individual is qualified to perform the duties of the job applied for or held, with or without reasonable accommodations. Then, and only then, can the employer defense of direct threat to others be evaluated.

The first question in the sequence is whether or not a person is "a qualified individual with a disability." 42 U.S.C. § 12112(a). That term means "a person who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). There are three embedded considerations: (1) whether the individual has a "disability;" (2) whether the person can perform the "essential functions" of the job; and (3) whether reasonable accommodations are possible.

Congress constructed with meticulous care and phrased in the present tense the definition of a "qualified individual with a disability." The statutory definition is written in the present tense — an individual who *can perform* the essential functions — to denote that present ability, not future ability, to perform the job is the primary, if not exclusive, consideration. 42 U.S.C. § 12111(8). The decision about whether an individual is qualified must be made "at the time of the job action in question; the possibility of future incapacity does not by itself render the

person not qualified." H.R. Rep. No. 485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337. [11]

The intention of Congress with respect to the term "essential functions" is equally clear. "Essential functions" are those "*job tasks* that are fundamental and not marginal." H.R. Rep. No. 485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (emphasis added); *see also* 29 C.F.R. § 1630.2(n)(1) (2001). Consideration is afforded the employer's judgment as to those job tasks that are essential. 42 U.S.C. § 12111(8). The EEOC's interpretive guidance notes that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative . . ." 29 C.F.R. § 1630, App. § 1630(2)(n) (2001).

The House Report also signaled that ability is the central focus at this stage.

> The ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities *unless they are actually unable to do the job*. The requirement that job criteria actually measure the ability required by the job is a critical protection against discrimination based on disability.

H.R. Rep. No. 485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353 (emphasis added).

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11. In this case, timing alone demonstrates that respondent is a "qualified individual with a disability." After having worked at the Chevron facility for twenty years without incident, he can certainly now "tolerate" chemical exposure even if, ultimately, he will not be able to continue to do so.

Nothing in the Act, its legislative history, or regulations, accordingly, suggests that health and safety factors are part and parcel of whether or not a person is a "qualified individual" under 42 U.S.C. § 12111(8).

The ADA incorporates several employer defenses to a charge of discrimination against a qualified individual with a disability. One is that a proposed workplace accommodation imposes an "undue hardship" on the business. 42 U.S.C. § 12112(b)(5)(A). Another is that the applicant does not meet qualification standards and selection criteria that are "job-related" and "consistent with business necessity." 42 U.S.C. § 12112(b)(6); 42 U.S.C. § 12113(a). The direct threat to others defense is a subset of the qualifications defense, specifically carved out by Congress to meet the health and safety aspects of the more general defense. 42 U.S.C. § 12113(a-b).

Despite the structure of the Act, Chevron urges that an individual with a disability who poses a "threat to self" cannot be considered "qualified" under the ADA. This argument mistakenly injects the everyday meaning of the word "qualified" into a tiered, structured, and defined statutory analysis. This Court has stated in *Fox v. Standard Oil Co.*, 294 U.S. 87 (1935) (Cardozo, J.), that a legislative choice of a definition that defines terms more narrowly, or with more precision, prevails over common understanding or usage.

Chevron also contends that Echazabal's ability to perform the functions of the job "safely" is an essential function of the position. Brief of Petitioner at 46. Amici for Chevron urge this Court to defer to Chevron's characterization that Echazabal be able to "tolerate" certain chemicals as an essential function of the plant helper job. *See, e.g.*, Brief of Amicus Chamber of Commerce at 8, 9. However, the legislative history that speaks to the focus of "job tasks" and the ability to "do" the job provides no support for incorporating a health and safety analysis into the question of whether a person is a qualified individual with a disability.

Adhering faithfully to the statutory sequence is critical. Chevron's arguments skew the analytical framework of the Act without compelling reason and contradict the literal and natural reading of the Act. *See EEOC v. Wafflehouse, Inc.*, No. 99-1823, slip op. (S. Ct. Jan. 15, 2002) (a statute must be given its "natural reading"). Under the ADA, health and safety concerns are reviewed in the context of employer defenses (and, specifically, the direct threat to others defense). These concerns are *not* an appropriate part of the analysis of whether a person is a "qualified individual with a disability."

As an articulated aspect of an employer's defenses (42 U.S.C. § 12113(a), (b)), health and safety issues can and must be considered. *See* 29 C.F.R. § 1630.2(q) (2001) (stating that qualification standards include "personal and professional attributes including skill, experience, education, physical, medical, safety and other requirements" necessary for an individual to be eligible for the position). As such, health and safety standards form "qualification standards" or "selection criteria" and are properly considered only in the context of the "defense" requirements under 42 U.S.C. § 12113(a).

Health and safety considerations are a critical component of the Act's tiered analysis, but are not to be tethered to or confused with essential job functions or qualifications, except in extremely limited and narrow circumstances.[12] Such

12. The United States and EEOC, as amici, suggest that there are certain isolated instances in which essential functions will "necessarily implicate issues of safety." Brief of Amicus United States at 26. Admittedly, a firefighter who could not "carry an unconscious adult out of a burning building," 29 C.F.R. § 1630, App. § 1630.2(n), would not be qualified to perform the essential functions of the position and would, also, be unsafe. Similarly, an airline pilot able to take off and land safely only "sometimes" could not perform the essential functions of the job. In both instances, the essential functions need not be analyzed in terms of safety but, rather, inability consistently to do that which the job *always*

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considerations apply at a later stage of the analysis. At that stage, Congress placed the burden on the employer to demonstrate that its selection criteria or qualification standards are job-related and reflect business necessity. *See* 42 U.S.C. § 12112(b)(6) ("unless" the standard is "job related . . . [and] consistent with business necessity . . ."); *see also* 42 U.S.C. § 12113(a); H.R. Rep. No. 485, pt. 3, at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 465 ("[A] facially neutral qualification standard, employment test or other selection criterion that has a discriminatory effect on persons with disabilities . . . would be discriminatory unless *the employer* can demonstrate that it is job related and required by business necessity.") (emphasis added).[13]

Beyond the express intent of Congress, there are good and sound policy reasons why the business necessity defense in general, and the direct threat defense in particular, should be

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demands. Consideration of such issues from a health or safety perspective only clouds the issue of what is required with respect to an essential functions analysis. *See, e.g., E.E.O.C. v. United Parcel Services, Inc.*, 149 F. Supp. 2d 1115, 1159 n.3 (N.D. Cal. 2000) ("[D]riving without accidents *is* like flying without crashing.").

13. A chronology of relevant events itself proves conclusively that Congress intended business necessity (and "direct threat") to be proven by the employer. Business necessity is not a new concept in employment discrimination law. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), a disparate impact case arising under Title VII, the Court placed the burden of proof with respect to business necessity upon the plaintiff. *Id.* at 659. In drafting the ADA, the Senate Committee specifically referred to allocation of burdens of proof as had existed the day *before* the *Ward's Cove* decision. S. Rep. No. 101-116, at 38 (1989). To further reinforce the point, Congress later, in the Civil Rights Act of 1991, clarified the business necessity defense by clearly placing the burden upon the employer. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Nw. U. L. Rev. 1279, 1339-42 (2001).

proven by the employer. Congress has incorporated consideration of the employer's judgment with regard to the essential functions of the job. 42 U.S.C. § 12111(8). With respect to business necessity and direct threat, the employer often will have superior information and knowledge about workplace requirements and operations. *See generally* Peter David Blanck & Glenn Pransky, *Workers with Disabilities*, 14 Occupational Medicine: State of the Art Reviews 581, 586-87 (1999). Moreover, making certain that business necessity and direct threat are subject to employer proof allows the mandated tiered analysis to go forward in an orderly fashion. The careful step-by-step process of analyzing job placement issues is short-circuited when defenses and essential functions are conflated or merged. Collapsing the issues or truncating the process renders decisions susceptible to the type of myth and paternalism that gave rise to the civil rights model and the ADA.[14]

Further, such conflation violates a basic canon of statutory construction, that no portion of a statute be rendered superfluous. *See TRW Inc. v. Andrews*, 122 S. Ct. 441, 448-49 (2001) (recognizing and applying canon); *Duncan v. Walker*, 121 S. Ct. 2120, 2125 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (*citing United States v.*

14. Cases cited by Amici Equal Employment Advisory Council and National Association of Manufacturers, in fact, illustrate the unfortunate effects of analysis of safety functions designated by Congress as a defense as part of the "qualified individual" analysis. By failing to respect the analytical rigor required by the statute, unnecessary confusion can result. *See, e.g., LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (affirming grant of summary judgment on the basis that plaintiff was not a "qualified individual" but incorporating "direct threat" analysis where medical condition posed a danger to plaintiff and "others as well"); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (alternate holding quoting with approval direct threat defense). In either case, the courts clearly could have separated the "qualified individual" analysis from the direct threat analysis as required by the statute with no violence whatsoever to the result.

Menasche, 348 U.S. 528, 538-39 (1955), *quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Indeed, why would Congress fashion a separate defense if "direct threat" were already addressed by the "qualified individual" analysis? This violates the requirement, recognized by this Court in *EEOC v. Wafflehouse, Inc.*, that the ADA be given its "natural" reading.

III. THE EEOC'S REGULATIONS CONCERNING DIRECT THREAT TO SELF ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

This Court held in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), that an agency exceeds its authority in enacting an administrative rule that expands a statutory definition. In *Solid Waste Agency*, the Court held that the Corps of Engineers had exceeded its authority when it promulgated regulations that expanded upon a statutory definition in the Clean Air Act because it departed from the plain language of the Act. *Id.* at 173.

In the ADA, Congress chose to define "direct threat" narrowly. 42 U.S.C. § 12111(3) ("The term 'direct threat' *means* a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."). The EEOC's definition of direct threat, and therefore its "direct threat" qualification standard, unwarrantedly expands the definition Congress chose to give "direct threat" in the ADA. Further, no other provision of the statute, including the "direct threat" defense, supports the EEOC's regulation. Accordingly, the "direct threat to self" regulation must be invalidated.

For the same reasons, the EEOC regulation cannot be saved by the deference accorded agency action in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The threshold question in determining whether *Chevron* deference is appropriate "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue

. . . court[s], . . . as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843.

Only "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id. See also United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) (holding that a court is "obliged to accept" an agency's position only if "Congress has not previously spoken to the point at issue" and the agency position is "reasonable"). Delegation occurs only "[w]hen Congress has 'explicitly left a gap for the agency to fill'." 121 S. Ct. at 2171 (*citing Chevron*, 467 U.S. at 843-44). Here there is no gap. Congress defined "direct threat" to mean a significant risk to others. 42 U.S.C. § 12111(3).[15] Nowhere in the Act is direct threat defined as a "risk to self." Accordingly, *Chevron* deference is not appropriate.

15. Even if a deferential standard is appropriate in this case, the EEOC regulation is an unwarranted expansion of Congressional intent in enacting the ADA. As this Court reasoned in *Chevron*, under a deferential standard, if a choice of interpretation made by an agency "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845, *citing United States v. Shimer*, 367 U.S. 374 (1961) (holding same).

Even in the event the Court finds that deference is appropriate, the purpose of the statute, as expressed in the statute itself, and the legislative history, make it clear that Congress would not have sanctioned the interpretation placed on the "direct threat" defense by the EEOC. The stated purpose and legislative history make it clear that Congress never intended that employers be charged with determining what risk an individual with a disability can or should accept in performing his or her job. *See* 42 U.S.C. § 12101(a)(5) (setting forth Congressional finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies . . . exclusionary qualification standards and criteria, and relegation to lesser . . . jobs, or other opportunities.")

CONCLUSION

The NCD's report on federal enforcement of the ADA, *Promises To Keep: A Decade of Enforcement of the Americans with Disabilities Act* (2000), noted that the EEOC's expanded definition of direct threat invites outcomes directly at odds with the ADA. The "threat to self" defense fosters the view that people with disabilities need to be protected from themselves and from their choices. This case is about who is best able to make those most personal of decisions, which here involves encountering some future risk to health in the workplace.

For the above stated reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

PETER BLANCK*
Professor and Director
LEONARD A. SANDLER
Clinical Professor
and Co-Director
UNIVERSITY OF IOWA COLLEGE
OF LAW, AND LAW, HEALTH POLICY
AND DISABILITY CENTER
431 Boyd Law Bldg.
University of Iowa
Iowa City, IA 52242-1113
(319) 335-9043

DIANE KUTZKO
MARK L. ZAIGER
DOUGLAS R. OELSCHLAEGER
SARAH J. GAYER
SHUTTLEWORTH & INGERSOLL, P.L.C.
500 Firstar Bank Bldg.
P.O. Box 2107
Cedar Rapids, IA 52406
(319) 365-9461

* *Counsel of Record*

Counsel for Amicus Curiae